30. Some of the codes expressly provide for the payment of sheriff's fees and expenses in preserving property held under attachment. Stover's New York Code (1902), sec. 3307.

BANKRUPTCY—TITLE OF TRUSTEE—VALIDITY AND PRESERVATION OF LIENS. —A conveyance of real property made by an insolvent, was not recorded and his creditors attached the property under a Virginia law giving them that right. Thereafter the deeds were recorded, and within four months after the attachment of the property, the insolvent was adjudged a bankrupt. The Bankruptcy Act of 1898 provides that attachments and other liens against the property of an insolvent obtained within four months of the filing of a petition in bankruptcy against him shall be void in case he is adjudged a bankrupt and the property affected by such attachments or liens shall be released from the same, and pass to the trustee as part of the estate of the bankrupt unless the court shall order the lien to be preserved for the benefit of the estate. *Held,* that the attachment liens could be preserved for the benefit of the bankrupt's estate, although the property subject thereto did not belong to the bankrupt as against the purchaser, and could not have been reached by the trustee, but for the attachment. *Receivers of Virginia Iron, Coal & Coke Co. et al.* v. *Staake et al.* (1904), C. C. A., Fourth Circuit, 133 Fed. Rep. 717.

The facts in this case are unusual in that a discharge of the lien of the attachment would cause title of the property to pass to the owners of the unrecorded deeds instead of to the trustees. This was urged to show that it did not come within the provisions of the statute allowing the court to preserve the lien for the benefit of the estate. In a dissenting opinion PURNELL, D. J., argues logically, that if the attachments did not inure to the benefit of the attaching creditors they should not be upheld to vitiate the unrecorded sale. "They were not in favor of the bankrupt," he says, "but for the debts due by him, and I cannot agree that even under the act of Congress a court of bankruptcy can convert a debt or liability into an asset." In the case of *In re George W. McKay,* 1 Am. Bankr. Rep. 292, it was held that under the Bankruptcy Act of 1867 the assignee had the same rights as the trustee has under the act of 1898. In consonance with this view are *In re Bozeman,* 2 Am. Bankr. Rep. 809, which follows the leading case of *Stewart* v. *Platt,* 101 U. S. 731, and also *In re Ohio Co-Operative Shear Co.,* 2 Am. Bankr. Rep. 775. But in the case of *In re Yukon Woolen Co.,* 2 Am. Bankr. Rep. 805, the court apparently recognizes the changes made by §§ 67 and 70 of the Act of 1898 in holding that if the title of a claimant is not good as against execution creditors the trustee stands in the place of the creditors and has a good and absolute title to the goods. In the principal case, however, the court goes farther in that it clearly overrules the line of authorities following *Stewart* v. *Platt, supra,* and distinctly states the effect of the changes made in this regard by the law of 1898.

BILLS AND NOTES—DISCHARGE OF INDORSER OF CHECK—WAIVER.—Plaintiff received a check drawn on a bank in a neighboring town, indorsed it and deposited it in defendant bank where it was placed to his credit. Defendant

promptly mailed it to the drawee for payment, but hearing nothing from it made inquiry some ten days after sending it and found it had not been received. After waiting several days longer, further inquiry was made by defendant, but the check had not yet been received by the drawee. Plaintiff was not notified of these facts until nearly a month after he made the deposit. At the request of defendant plaintiff procured a duplicate check to be drawn, which was mailed direct to defendant by the drawer. This check was marked "duplicate," with the notation "Original not payable," and plaintiff called at the bank and indorsed it. Upon presentment payment was refused for lack of funds and defendant charged the amount back against plaintiff's account. Plaintiff sues to recover this amount as part of the balance of his account. *Held,* that the plaintiff could recover. *Aebi* v. *Bank of Evansville* (1905), — Wis. —, 102 N. W. Rep. 329.

Through the negligence of defendant in failing to present the check for payment within a reasonable time, the indorser was discharged from liability, whether his rights were substantially affected by such negligence or not. *Wymore First National Bank* v. *Miller,* 43 Neb. 791; 40 Am. St. Rep. 499; 7 Cyc. 979; 22 L. R. A. 785, note. As to what is a reasonable time must depend upon the circumstances of each particular case, except in so far as the matter is regulated by statute. See DANIEL'S NEGOTIABLE INSTRUMENTS (4th Ed.) Vol. II, Sec. 464. But it was contended here that by indorsing the duplicate check with knowledge of the facts, plaintiff waived the benefit of his discharge. Had the indorser made an express promise to pay with full knowledge of the laches no doubt he would have been held liable. *Tebbetts* v. *Dowd,* 23 Wend. (N. Y.) 379; *Ross* v. *Hurd,* 71 N. Y. 14, 27 Amer. Rep. 1. But waiver being in derogation of the rights of the indorser will be strictly construed. AM. & ENG. ENCY., Vol. V, p. 1049. In the present case the court seems to be well supported by reason and authority that there was no new promise to pay. The duplicate instrument was merely representative as a substitute for the original, and indorsing it created no new contract whatever. A like decision on the same point was reached in the case of *Bank of Gilby* v. *Farnsworth,* 7 N. D. 6. See also *Benton* v. *Martin,* 52 N. Y. 570.

BILLS AND NOTES—INDORSEMENT OF PAYEE FORGED BY DRAWER—RECOVERY BY DRAWEE.—Plaintiff agreed to advance money to A for purchase of cattle by honoring drafts drawn on him by A, each draft to have on the back thereof a bill of sale to plaintiff of the cattle for which it was given in payment. A drew drafts in favor of B et al., indorsed their names thereon, and also filled out and signed with their names the bills of sale on the back. These drafts he procured to be cashed by the defendant bank, which through another bank collected them from plaintiff who did not discover the fraud until some months afterward. Plaintiff then demanded repayment from defendant, and upon the latter's refusal brought suit. *Held,* that plaintiff could recover. *LaFayette & Bro.* v. *Merchants' Bank of Fort Smith* (1905), — Ark. —, 84 S. W. Rep. 700.

The general rule in such cases, where money has been paid under a mistake of fact is that it may be recovered. *Mer. Nat. Bank* v. *Nat. Bank of*